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## THIEVES, PARENT ABUSERS, DRAFT DODGERS... AND HOMICIDES?

The authenticity of Dem. 24.105\*

**ABSTRACT:** *This article discusses the authenticity of the document preserved at Dem. 24.105. This purportedly reports two laws, one about theft and the other about parent abusers, draft dodgers and homicides. Scholars have often believed it to provide reliable information about the procedures of dike klopes, apagoge phonou and apagoge against atimoi. This analysis shows that the document is inconsistent with other, reliable, information about the same topics and its language does not conform to that of contemporary official documents on stone. The document must be deemed a late forgery and no part of it can be considered reliable.*

### Introduction

In his speech *Against Timocrates* (102), Demosthenes discusses certain categories of criminals, namely thieves, parent-abusers and draft dodgers,<sup>1</sup> to show the judges that the law of Timocrates aims to help the undeserving and undermines public safety.<sup>2</sup> This is the last in a series of arguments in which Demosthenes shows that Timocrates' law, which releases public debtors from prison if they can offer sureties for their debt, must be repealed. In his previous arguments Demosthenes argues that Timocrates enacted his law without following the proper procedure and that his statute contradicts many existing laws. Here he attempts to prove that its effects would harm the community.<sup>3</sup>

\* Earlier drafts or sections of this article have been read by, and have benefited from the encouragement and advice of, Peter Rhodes, Chris Carey and Andrej Petrovic. Edward Harris has read various drafts and helped me from the beginning with invaluable insights. The anonymous readers of *Historia* have also offered many very good suggestions and saved me from many mistakes. My wife Lilah-Grace Canevaro is to be thanked if the English does not sound as Italian as it might have. To all of them goes my gratitude.

1 Whatever the attempts of the litigants to exploit the open texture of the relevant law, I subscribe to the *communis opinio* that *astrateia* and *lipotaxion* described different actions. *Astrateia* described failure to report for duty, *lipotaxion* leaving one's place in battle out of cowardice (see Hamel 1998 and Harris 2004: 256–7). I translate therefore *astrateutos* as 'draft dodger'.

2 I accept the Demosthenic authorship of the speech and refer to Demosthenes as the author, although I am aware that Diodorus pronounced it in court. Cf. Dem. 24.6–16 with MacDowell 2009: 181–5.

3 For an analysis of the context, topic and arguments of this speech see MacDowell 2009: 181–96.

In this context, at § 104 the speaker asks the secretary to read out the relevant laws about thieves, parent abusers and draft dodgers, and after a *lemma* (ΝΟΜΟΙ ΚΛΟΠΗΣ, ΚΑΚΩΣΕΩΣ ΓΟΝΕΩΝ, ΑΣΤΡΑΤΕΙΑΣ) the manuscripts consistently report a document that purports to preserve two separate laws, the first about the procedure of *dike klopes*, the second about the use of *apagoge* against homicides (after the proclamation of the *basileus*), parent abusers and draft dodgers trespassing where they are not allowed. If reliable, the information in the document would provide valuable evidence about these procedures and the penalties for these offenses. However, this information is not consistent with the other evidence found in our sources for these procedures. As a result, scholars have advanced complicated hypotheses to try to explain away these inconsistencies, as well as the most troublesome features of the document, but no agreement has been reached. Moreover, scholars have not been able to explain certain aspects of the language and style of the document. For instance, in the first part of the document the meaning of the expression πρὸς τοῖς ἐπαίτιοις is still a matter for debate,<sup>4</sup> and the penalty of δεκαπλασίαν when the stolen goods were not recovered is often considered unacceptable and emended into διπλασίαν.<sup>5</sup> In the second part of the document, *apagoge* is prescribed alone, with no mention of *endeixis*, as the correct procedure against certain categories of *atimoi*, whereas all our other sources agree in mentioning *endeixis* as the appropriate procedure against *atimoi*.<sup>6</sup> Finally the procedure of *apagoge* against trespassing homicides found in the document is quite inconsistent with the extensive description of this same procedure at Dem. 23.80. This has caused scholars like MacDowell, Hansen, Gagarin and Carawan to advance many conflicting hypotheses to explain the inconsistencies, postulating alternative yet similar procedures for slightly different cases (e. g. *apagoge* against accused homicides who have trespassed vs. *apagoge* against suspected homicides who have trespassed), assuming different meanings for the same words in different contexts, lamenting Demosthenes' distortion of the letter of the law in the *Against Aristocrates* (23.80), or more generally claiming that 'that the laws on *apagoge* were not presented systematically.'<sup>7</sup>

4 Cf. e. g. Reiske 1822: 344; Wayte 1882: 173; Lipsius 1905–15: 441 n. 79; Harrison 1968: 166; Cohen 1982: 62–4; Moneti 2001: 102; Pelloso 2008: 109 n. 221. See below pp. 34–35.

5 This emendation was first proposed by Heraldus, and has been accepted by, among others, Harrison 1971: 166 n. 5; MacDowell 1978: 148; Saunders 1990: 75; Harris 2006: 380. *Contra* Moneti 2001: 101 and Pelloso 2008: 108. The emendation is also accepted in the most recent edition of the speech by Dilts.

6 Cf. Hansen 1976: 94–5 nn. 2–3 and Scafuro 2005: 55–6. Whether *endeixis* was completely separate from *apagoge* or not, all the sources do mention *endeixis* in relation to *atimoi*. Whatever we think on the subject we should expect in the document *endeixis* to be mentioned (alone or in connection with *apagoge*). See below pp. 41–42.

7 The various interpretations I allude to here are those in MacDowell 1963: 130–40; Hansen 1976: 99–108 and 1981: 17–21; Gagarin 1979: 313–22; Carawan 1998: 362–4. The quotation at the end of the paragraph is from Gagarin 1979: 317. Volonaki 2000 reconstructs the development of different kinds of *apagoge* against homicides mostly based on Ant. 5 and Lys. 13, with discussions also of Lys. 13.56

Instead of reviewing each of the various proposals, we should begin by examining the authenticity of the document and question the assumption shown by all these scholars that the information contained in it is reliable. The reason why the document presents so many problems and is so heavily inconsistent with external evidence is that it is the work of a later forger, and bears no resemblance to, nor does it preserve any information from, the laws (plural, since Demosthenes tells the secretary: ἀνάγνωθι δὲ καὶ τούτους τοὺς νόμους) that the speaker intended to be read out at this point in the speech.

There are many reasons to question the document's authenticity. First of all, the document was not part of the *Urexemplar* of the speech *Against Timocrates* and was added at a later date. This is proven by the stichometry preserved in the medieval manuscripts of the speech. Stichometry was a system of measurement of literary texts used in antiquity: letters were added in the margin every 100 lines, and a total number of lines was indicated at the end of a given work. Such letters are often preserved in the manuscripts of the Demosthenic corpus, but they never match the number of lines of the relevant manuscripts. On the other hand, they are always consistent among different manuscripts (in this case between F and B) in marking the same passages of the text. This happens because they were first applied to a very ancient copy of the speech, then copied uncritically in the following copies, regardless of the size of the new papyri, and later new manuscripts.<sup>8</sup> If we calculate the number of characters per 100 lines in all the sections without documents of the speech *Against Timocrates*, we find that each section has on average 3500 characters. The longest section has 3642 characters, and the shortest 3428. The section in which our document is preserved is that between the letters I and Λ (§ 100 ὑπάρχοντας – 122 ἐνεθυμήθην), corresponding to 200 lines. If we measure it including the document, we arrive at a figure of 7605, 3802 characters per 100 lines, which is inconsistent with those of the rest of the speech. By contrast, if we remove the document, we have 7097, that is, 3548 characters per 100 lines, a perfectly acceptable figure. This is clear evidence that the document was not present in the earliest editions of the speech and not present in the very ancient edition to which stichometry was applied, which was in all probability produced at the beginning of the 3<sup>rd</sup> century BCE.<sup>9</sup> It must have been added at a later date.<sup>10</sup>

Second, many documents found in the speeches of the Attic orators (and in particular those documents that were not included in the stichometric edition of the speech) are

and Lyc. 1.112. Significantly, when it comes to *apagoge phonou* (used against trespassing homicides), she refers only to Dem. 23.80, and our document does not merit even one mention in the whole article.

- 8 Cf. in general about stichometry Ohly 1928: 101–25; for the case of Demosthenes, Christ 1882; Burger 1887; Burger 1892; Drerup 1898: 235–237; Goodwin 1901: 350–355; MacDowell 1990: 44; Kapparis 1999: 56–7; Canevaro 2010: 345–8. MacDowell, Kapparis and Canevaro argue that the stichometric numbers derived from measurements of the lines of an ancient copy (perhaps the first edition) of Demosthenes. For a fuller account of this hypothesis cf. Canevaro 2011: 292–303.
- 9 See MacDowell 1990: 44; Kapparis 1999: 56–7; Canevaro 2010: 345–8 and Canevaro 2011: 292–303 for this hypothesis.
- 10 For a more extensive treatment of the stichometry of the *Against Timocrates* see Canevaro 2011: 32–6. For previous calculations, see Burger 1892: 10–11.

now recognized to be forgeries. The documents of Demosthenes' *On the Crown* have been considered unreliable since the work of Droysen showed how their prescripts and the names of the archons preserved were inconsistent with other evidence.<sup>11</sup> The documents of Aeschines' *Against Timarchus* are also widely recognized as forgeries,<sup>12</sup> and more recently MacDowell has shown that the witness statements and at least one law in Demosthenes' *Against Meidias* have post-Classical linguistic forms, while Harris has convincingly argued that also the other documents in this speech are forgeries.<sup>13</sup> Moreover Kapparis has shown that 11 of the documents in Apollodorus' *Against Neaera* ([Dem.] 59) are forgeries, and I have argued that the decree for the naturalization of the Plataeans at § 105 cannot be an authentic Athenian decree.<sup>14</sup> Harris and I have also recently discussed the documents of Andocides' *On the Mysteries*. In another article I have examined in detail the documents § 20–3 and 33 of the speech *Against Timocrates*. In both cases the documents should not be considered authentic.<sup>15</sup>

Thus, there are good reasons to doubt the authenticity of the document at Dem. 24.105, and the widespread contention that, genuine or not, this document contains reliable information about Athenian law and procedures should be questioned. Like most of the documents mentioned in the previous paragraph, it was not included in the speech at the beginning of its tradition, and since, as we have seen, many documents that were included at a later stage are clearly forgeries, its text should be carefully assessed before accepting any information it provides as reliable. In fact, this is not the first time that its authenticity has been questioned. Although it escaped the most thorough investigations conducted in the 19<sup>th</sup> century, commentators like Benseler and Wayte did not consider it authentic.<sup>16</sup> More recently, the two parts of which the document is composed, that about *dike kloses* and that about parent abusers, draft dodgers (and homicides?), have been questioned by Hillgruber and Scafuro respectively. Hillgruber, in a discussion of the identification between the first part of this document and the law discussed at Lys. 10.16, points out that the document's authenticity is not above suspicion, but does not attempt to discuss the issue.<sup>17</sup> Scafuro, in a lengthy contribution about the second part of this text, tests all the different hypotheses advanced to reconcile their evidence with Dem. 23.28, 80 and Ant. 5, and finds them wanting. She concludes that their evidence cannot in fact be reconciled with our document, and that at least the clause ἡ προεἰρη-

11 Droysen 1893: 95–256. Cf. also Schläpfer 1939 and Wankel 1976: 79–82 and *passim* for more up-to-date accounts.

12 Cf. Drerup 1898: 305–8; Fisher 2001: 68, 138–40, 145, 164, 183, 204–5, 206.

13 Cf. MacDowell 1990: 245–6, 302, 316, 317–8, 333, 343–4, Harris 1992: 76–8 and Harris 2008: 86–7, 89–90, 103–4, endorsed by Faraguna, *BMCR* 2009.12.13.

14 Kapparis 1999: 58–60, 215–6, 221–2, 225–6, 235–6, 239–40, 262–3, 265, 276–7, 316–7, 351–3, 431–6; Canevaro 2010.

15 Canevaro-Harris 2012 and Canevaro 2012.

16 Benseler 1861: 218; Wayte 1882: 171–3. Navarre-Orsini 1954: 163, 218 and Dilts 2005: 361–2 also put the document in brackets.

17 Hillgruber 1988: 66–8.

μένον αὐτῷ τῶν νόμων εἶργεσθαι must be spurious.<sup>18</sup> She opts however for a ‘conservative’ hypothesis, according to which an editor with access to some collection of authentic Athenian laws on papyrus found original laws about *atimoi* and imprisoned wrongdoers and ‘copied out a bit of the law from one part, and a bit from another part of a longer (possibly much longer) piece of legislation’, abbreviating and contaminating different laws in the process, and considers only the clause ἡ προειρημένον αὐτῷ τῶν νόμων εἶργεσθαι actually spurious.<sup>19</sup> However, although she claims that a criterion for regarding a given inserted law as ‘genuine’ is that ‘its phraseology and idiom are those of Athenian law’, she does not compare the document’s language with that of contemporary inscriptions, and therefore misses many of its problems. Her second criterion, that of the ‘functional feasibility’ of the document, is in fact applied only with regard to how the information provided in it fits different pictures of *apagoge* used against homicides, and her result is that it does not. This article will show that the clause ἡ προειρημένον αὐτῷ τῶν νόμων εἶργεσθαι is not the only one in the document that is not ‘functionally feasible’, and that the amount of problems cannot be explained away by any ‘conservative’ hypothesis.

Other principles should also be kept in mind when assessing such a document. These principles have been outlined and tested elsewhere. Here I only present a summary of the basic principles for evaluating the authenticity of the documents found in the speeches of the orators. First, one should consider the summaries of the laws and decrees given by the orators in their speeches, in particular those in close proximity to the actual quotation of a law, to be reliable. Evidence found in other passages in the orators and in inscriptions often provides confirmation for many of the statements in these summaries and paraphrases. If the inserted documents are reliable, therefore, their contents should be consistent with the summaries found in the text of the speech into which they have been inserted. Second, if the document contains details that are absent from the orator’s summaries or paraphrases, this is not necessarily evidence that proves that the document is authentic. In fact, a quick look at the documents in Demosthenes’ *On the Crown* and Aeschines’ *Against Timarchus* clearly shows that the persons who composed the forged documents in these speeches relied on the paraphrases found in the adjoining text but added several details to give the misleading impression that they had an independent source. Third, documents should conform to the language, style and conventions of Classical Athenian inscriptions of the same type. One should take account of developments during the fifth and fourth centuries and give more weight to inscriptions dated closer in time to the actual law or decree. Slight variations do not amount to decisive evidence of forgery, since standard formulas can ‘in fact appear in several forms with small verbal differences’,<sup>20</sup> but the presence in a document of words or expressions never found in similar Attic inscriptions, or in any Attic inscription at all, casts serious doubts on the document’s authenticity. Fourth, one should analyse the

18 Scafuro 2005. See also the response to this contribution, Mirhady 2005.

19 Scafuro 2005: 68.

20 Rhodes 1980: 309.

documents as they are found in the *paradosis*. Scholars often attempt to remove the problems found in the documents by means of transpositions, emendations, and deletions. These attempts to ‘improve’ the text are not methodologically sound. If one can determine on the basis of external evidence that a particular document is genuine, it is then legitimate to attribute minor errors to scribes copying the text. But to assume that a document is genuine and therefore to attribute every mistake to medieval scribes begs the question.<sup>21</sup>

With these principles in mind, it is possible to undertake an analysis of our document that will show that its problems are much more extensive than previous scholars have recognized; its text is inconsistent with the paraphrases Demosthenes provides right next to it, its language contains expressions and formulas unattested in Athenian official language as we find it in inscriptions, and some clauses contradict well-known features of Athenian legal procedure. By contrast, nothing in the document requires us to assume that the person who composed it had access to sources unknown to us. The information found in it has been drawn from the speech itself, as well as from other speeches of the orators, and supplemented with details invented by a forger.

I will start my analysis by setting the document in its context, discussing the paragraphs preceding it and extracting some information about the contents. I will then provide the unemended text of the document as it appears in the *paradosis*, with an *apparatus criticus* and a translation. This will be followed by two separate sections about the two parts of the document, that about the *dike klopes*, and that about trespassing *atimoi*. I will then conclude with a section summarizing the main findings of this article, listing what contentions about the procedures and laws this document is concerned with are now unwarranted as a result of its disposal, and what features and procedures are now clear.

### The speaker’s introduction and the document

At § 102 Demosthenes summarizes the last section of the speech *Against Timocrates*: Timocrates’ law does not allow the courts to impose additional penalties, grants impunity to those who have committed crimes against the public, undermines the military and destroys the city’s finances. Moreover, it helps criminals, parent abusers and draft dodgers. In the next paragraph (§ 103) the speaker develops this argument. He attributes the laws that he is about to discuss to Solon, and then claims that the ancient lawgiver was a legislator who had nothing in common with Timocrates. In fact, he provided that the court can impose the additional penalty of imprisonment on a thief, if the assessed penalty for him is not death (προστιμᾶν αὐτῷ δεσμὸν). Solon also prescribed that if someone convicted for mistreating his parents enters the *agora*, he shall be imprisoned. The same is true for those who after a conviction for *astrateia* behave as if they were

21 For more extensive expositions of this methodology, see Canevaro 2010: 341–5; 2011: 42–50; Canevaro-Harris 2012.



in possession of their full rights. Timocrates by contrast grants all of them impunity by allowing them to provide sureties and thus avoid imprisonment.

At § 104 Demosthenes asks the clerk to read out these laws (ἀνάγνωθι δὲ καὶ τούτους τοὺς νόμους). The plural indicates that the clerk read out more than one law, no doubt a law for each category discussed in the previous paragraph. We would therefore expect a law about thieves, a law about those who abuse their parents and a law about draft dodgers. Our document contains only two statutes, one about thieves and a second applying both to those who abuse their parents and to draft dodgers. My treatment will follow this arrangement, and I will discuss first the part of the document purporting to be the law on theft and then the second part. I first of all provide the text of the document:

#### NOMOI ΚΛΟΠΗΣ, ΚΑΚΩΣΕΩΣ ΓΟΝΕΩΝ, ΑΣΤΡΑΤΕΙΑΣ

Ὅτι ἂν τις ἀπολέσῃ, ἐὰν μὲν αὐτὸ λάβῃ, τὴν διπλασίαν καταδικάζειν, ἐὰν δὲ μή, τὴν δεκαπλασίαν πρὸς τοῖς ἐπαιτίοις, δεδέσθαι δ' ἐν τῇ ποδοκάκῃ τὸν πόδα πένθ' ἡμέρας καὶ νύκτας ἴσας,<sup>22</sup> ἐὰν προστιμήσῃ ἢ ἡλιαία. προστιμᾶσθαι δὲ τὸν βουλόμενον, ὅταν περὶ τοῦ τιμήματος ᾖ.

Ἐὰν δὲ τις ἀπαχθῇ, τῶν γονέων κακώσεως ἐαλωκῶς ἢ ἀστρατείας ἢ προειρημένον αὐτῷ τῶν νόμων εἴργεσθαι, εἰσιὼν ὅποι μὴ χρή, δησάντων αὐτὸν οἱ ἔνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορεῖτω δὲ ὁ βουλούμενος οἷς ἔξεστιν. ἐὰν δ' ἄλῳ, τιμάτω ἢ ἡλιαία ὅτι χρή παθεῖν αὐτὸν ἢ ἀποτεῖσαι. ἐὰν δ' ἀργυρίου τιμηθῇ, δεδέσθω τέως ἂν ἐκτείσῃ.

δεδέσθαι – ἢ ἡλιαία Lys.10.16 | ποδοκάκῃ Harp. s.v π 76 Keaney | Ἐὰν δὲ ἐαλωκῶς Sud. s. v. ἄλω (α 1371) Adler – ἀστρατείας AB 123.11

NOMOS A | ΑΣΤΡΑΤΙΑΣ F | αὐτὸ λάβῃ codd. : ἀπολάβῃ Bernard | δεκαπλασίαν codd. : διπλασίαν Heraldus | ποδοκάκῃ S | ἡμέρας δέκα τὸν πόδα (καὶ νύκτας ἴσας om.) Lys. | ἐπαχθῇ Sud. | γενεῶν S | ἀστρατείας F<sup>a</sup> | προειρημένων SYP | τῶν νόμων εἴργεσθαι codd. : τῶν νομίμων εἴργεσθαι Salmasius | εἴργασθαι A<sup>a</sup> | ὅποι χρή (μὴ om.) A | εἰσαγόντων AP : εἰσαγόντων αὐτὸν SFY | ἀποτεῖσαι et ἐκτείσῃ Blass : ἀποτίσαι et ἐκτίσῃ codd.

#### LAWS ON THEFT, MALTREATMENTS OF PARENTS, DRAFT EVASION

Whatever one should lose, if he recovers it, the punishment shall be twice the value, but if he does not, ten times the value in addition to the *epaitiois* (?). He shall be tied in the *podokakke* by the foot for five days and five nights, if the *Heliaia* imposes this additional penalty. Whoever wants shall impose this additional penalty when the penalty is discussed.

If someone is subjected to *apagoge* for entering where he is not allowed, despite having been convicted of mistreating the parents or of not reporting for duty or despite

22 All editions have ἴσας, with no mention of any other reading in the *apparatus criticus*. Dilts has instead ὅσας with no mention of any variant in the *apparatus criticus* (which would imply that this is the reading of all the main manuscripts). I have checked A (Munich, Bayerische Staatsbibliothek, Cod. graec. 485) and it clearly reads ἴσας. I assume therefore that ὅσας in Dilts' edition is a typo.



his exclusion from customary places having been proclaimed (?), the Eleven shall imprison him and bring him before the Heliiaia. Anyone among the qualified Athenians who wishes so shall be the prosecutor. If the culprit is condemned, the Heliiaia shall give him the punishment, pecuniary or otherwise, that they think fit. If he is condemned to pay a fine, he shall stay in prison until he has paid what he has been condemned to.

### The *dike klopes*

At § 103 Demosthenes states that thieves, if they have not received the death penalty, can be condemned to the additional punishment of imprisonment. At § 108 begins a long summary of the legal arguments of the speech. Our section is summarized at § 113–5. This summary provides more details about the law on theft quoted in our section than does the section itself.<sup>23</sup> Demosthenes again claims that Timocrates as a lawgiver does not resemble Solon at all. Solon did not help wrongdoers. Instead he ordered that if someone steals goods worth more than 50 drachmas in daytime, there shall be *apagoge* to the Eleven. If someone steals goods for any value at night, anyone may kill him, wound him in the pursuit or employ the *apagoge* to the Eleven. When a thief is subject to *apagoge*, the penalty is always death. The penalty is also death for those who have stolen something worth more than ten drachmas from the Lyceum, the Academy, the Cynosarges, some gymnasium or the harbours. This description fits very well with, and expands, what we know about the procedure of *apagoge* against *kakourgoi*. The Ps.-Aristotelian *Constitution of the Athenians* (52.1) reports that ‘the Eleven punish with death those who are arrested as thieves (*kleptas*), enslavers (*andrapodistas*) and robbers (*lopodutas*) if they confess, while if they dispute the charge, they bring them before the court.’<sup>24</sup> If they are acquitted, the Eleven release them, and, if not, execute them.’ The condition for employing *apagoge* was that the *kakourgos* was caught ἐν αὐτοφώρῳ (‘when guilt is obvious’).<sup>25</sup> An alternative, rather shadowy procedure to be employed in the same cases was *ephegesis*, which differed from *apogoge* only in that the prosecutor himself did not arrest the wrongdoer, but had the Eleven arrest him.<sup>26</sup> Demosthenes seems to overlook it here.

Demosthenes continues by stating that if someone is convicted instead in a *dike klopes*, he shall have to pay twice the assessed value of the stolen goods (διπλάσιον

23 In general about Athenian legislation on theft cf. Cohen 1983 with the criticisms and corrections of MacDowell (1984) and Harris 2006: 373–90.

24 These were the only three categories explicitly covered by *apagoge* against *kakourgoi*. Hansen 1976: 36–48 argues that other categories, like homicides and seducers, were also subject to this procedure (although they were not named in the law), but see Harris 2006: 386–88 and 291–93.

25 Isae. 4.28; Dem. 14.81; Aeschin. 1.91; Poll. 8.49; Phot. s. v. ἐνδεκα. For the meaning of the expression ἐν αὐτοφώρῳ see Harris 2006: 373–90. Harris also explains the substantive difference between this procedure and the *dike klopes*.

26 Dem. 22.25–7 with Carey 2004: 129–32 for the correct understanding of the passage. Cf. Hansen 1976: 24 for the procedure.

ἀποτεῖσαι τὸ τιμηθέν), and the judges shall be able to inflict the additional penalty of five days and nights of imprisonment, so that everyone will see that he has been imprisoned. Demosthenes then explains the rationale of this provision: a thief cannot get away with his crime by simply refunding the value of the object he has stolen, otherwise stealing would be profitable. Thus Solon provided that he had to pay twice as much, and because of the imprisonment live the rest of his life in shame. Timocrates instead enacted a law that allows the thief to pay back the simple value of the stolen goods and get away without any additional punishment.<sup>27</sup>

From these two summaries the law about theft quoted at § 105 seems to have included at least a section on the kinds of theft prosecuted through *apagoge* and whose punishment was death (at § 103 the very short summary begins with a reference to the cases in which penalty is death) and a section on the *dike klopes*,<sup>28</sup> a private procedure by which the thief had to refund twice the value of the goods stolen and could receive the additional penalty of five nights and five days of imprisonment. These summaries, as we have seen, are confirmed by information from other sources.

The inserted document is not consistent with this information. In particular, it does not include any section about thieves arrested by *apagoge*. It could be that Demosthenes is here giving a more extensive account, and the quoted law was abbreviated so that it included only the procedure that could result in imprisonment, that is the *dike klopes*. It is also possible, and more likely since the document has been inserted later, that the editor chose to insert only the section of the law concerned with imprisonment. However, it is implausible that a later editor who had access to the original law decided to insert only a small portion of it, neglecting to mention the provisions that Demosthenes discusses extensively.

Another discrepancy is that Demosthenes asserts that the main punishment in a *dike klopes* is διπλάσιον ἀποτεῖσαι τὸ τιμηθέν, whereas the document provides that ‘whatever one should lose, if he recovers it, the punishment shall be twice the value, but if he does not, ten times the value in addition to the *epaitiois*.’ First, there is no mention of such a distinction in Demosthenes’ summary (nor in any other ancient source). Second, even the phrase stating that ‘the punishment shall be twice the value’ seems mistaken. Demosthenes at § 115 explains the expression διπλάσιον ἀποτεῖσαι τὸ τιμηθέν stating that Solon did not accept that one could get away with theft by returning only what he stole, but he had to pay twice as much (ἀλλὰ ταῦτα μὲν διπλάσια καταθεῖναι).

- 27 The descriptions of the *dike klopes* are consistent and must be accurate. This does not mean however that Demosthenes’ legal argument here works. The law of Timocrates dealt with the additional penalty of imprisonment only for public debtors, whereas a thief had to return the money to his victim, not to the state. The law of Timocrates would not have applied to thieves. As usual, Demosthenes’ reports of the provisions of the laws read out are accurate, but his interpretation is not necessarily convincing.
- 28 There is no sign here of the shadowy *graphe klopes*, mentioned only at Dem. 22.27. Cohen 1983: 45–9 argues that this procedure was available only against those who stole public property. MacDowell 1984 is not convinced, and believes in a wider range of application. There is no decisive evidence about this procedure, and a clear understanding of it is not necessary for the sake of my argument.

Timocrates instead provided that he had to return the simple value, and not the double (ἀλλ' ὅπως ἀπλᾶ μὲν, ἃ δεῖ διπλάσια, καταθήσουσιν παρεσκεύασε). This makes it clear that the penalty was to return twice the value of the stolen goods, and not twice their value in addition to the stolen goods themselves. The document instead provides that if the goods are recovered (simple value) the punishment shall be twice their value, that is, in addition to the goods themselves. This contradicts Demosthenes' wording.

Third, the words 'ten times the value in addition to the *epaitiois*' also present problems: a penalty for theft of ten times the value of the stolen goods belonging to a private individual is not attested in our sources. Demosthenes at § 114 clearly states that the penalty was double the value. His statement is confirmed by Aulus Gellius (11.18): Solon '*sua lege in fures non (ut antea Draco) mortis, sed dupli poena vindicandum existimavit*.'<sup>29</sup> This passage is likely to derive from an independent source, and not from Demosthenes, since Gellius asserts that under Solon's law death was no longer a viable punishment for theft, whereas Demosthenes lists in his passage plenty of cases of theft for which the penalty was death. Heraldus, the old commentator on Petit's *Leges Atticae*, proposed to emend δεκαπλασίαν to διπλασίαν, and this emendation has become the *vulgata*.<sup>30</sup> However, since the manuscripts are all consistent in reporting the reading δεκαπλασίαν,<sup>31</sup> such an emendation would correct the text into authenticity. Methodologically it is better to accept the *paradosis* as it stands, and either to explain δεκαπλασίαν or to consider it evidence of clumsy forgery. Cohen has tried to defend the plausibility of a penalty of ten times the value of the stolen goods by pointing out that Demosthenes himself at § 112 contemplates such a penalty for thieves. However, that passage refers to magistrates convicted for theft or embezzlement at their *euthynai*. That in such cases the *logistai* could inflict this penalty is confirmed by *Ath. Pol.* 54.2, but this has nothing to do with actual thieves that stole private property and can hardly be used as evidence that such a penalty was contemplated when the stolen goods were not recovered.<sup>32</sup> The penalties for magistrates were obviously different and more severe. This passage, rather than a confirmation of the δεκαπλασίαν penalty, is more likely to have been misinterpreted by a forger as referring to the *dike klopes*, and be therefore his source for the reading δεκαπλασίαν.

The *paradosis* must be accepted as it stands and speaks against the authenticity of the document. Yet even if we accept the emendation, the text still conflicts with Demosthenes' account. It would in fact provide that in case the stolen goods are not recovered the thief must pay twice their value πρὸς τοῖς ἐπαιτίοις. The meaning of this expression

29 Paying double the value of the goods stolen is the penalty for *furtum nec manifestum* also in Roman law. Cf. Gai. *Inst.* 3.190; Gell. *NA* 11.18.15.

30 Cf. Harrison 1971: 166 n. 5; MacDowell 1978: 148; Saunders 1990: 75; Harris 2006: 380. The recent edition by Dilts accepts the emendation. Cf. Pelloso 2008: 108–9 nn. 219–20 for previous bibliography on δεκαπλασίαν.

31 Cf. also Moneti 2001: 101 and Pelloso 2008: 108.

32 Pace Cohen 1982: 62–4 and Pelloso 2008: 108–9 n. 220. The other evidence adduced, *Plat. Leg.* 914b is hardly relevant.

is unclear. Poll. 8.22–3 explains it as referring to the additional penalties. The penalty of paying twice the value of the stolen goods would be inflicted in addition to the further penalties, namely, according to the document, confinement in the stocks.<sup>33</sup> This reading makes no sense. What is the point of inflicting the main punishment (payment of twice the value of the stolen goods) in addition to (that is, after: *πρὸς*) a penalty which has not yet been imposed, and perhaps will not be, since it is only optional?<sup>34</sup> It makes much better sense to accept Reiske's explanation of the expression: 'praeter simplum valorem eius rei, quam quis furto avertisse accusatur'.<sup>35</sup> However, if we accept this explanation, we encounter the same difficulty as with the penalty for stealing goods later recovered: the payment of twice the value is imposed in addition to the payment of the value of the goods themselves. The thief must in fact pay thrice as much as he has stolen instead of twice as much as clearly stated by Demosthenes at § 115. The conflict with Demosthenes' words is impossible to eliminate.

Another suspect feature of the first sentence of the document is that *ἐπαίτια* is never found in Attic inscriptions, nor is the adjective *ἐπαίτιος* with any of its meanings.<sup>36</sup> Moreover the verb *λαμβάνω* is never found in Classical sources with the meaning 'to recover'. The proper verb would be *ἀπολαμβάνω*.<sup>37</sup> The sentence as it stands can hardly have been part of an authentic Athenian statute.

The next sentence, *δεδέσθαι δ' ἐν τῇ ποδοκάκκῃ τὸν πόδα πένθ' ἡμέρας καὶ νύκτας ἴσας, ἐὰν προστιμήσῃ ἡ ἡλιαία* ('He shall be tied in the *podokakke* by one foot for five days and five nights, if the *Heliaia* imposes this additional penalty') seems to be confirmed by Lys. 10.16, which quotes some sentences of ancient laws of Solon to point out the use and the meaning of archaic words. The first of these quotations runs like this: *δεδέσθαι δ' ἐν τῇ ποδοκάκκῃ ἡμέρας δέκα τὸν πόδα, ἐὰν μὴ προστιμήσῃ ἡ ἡλιαία*. Lysias explains that *ἐν τῇ ποδοκάκκῃ* means *ἐν τῷ ξύλῳ* ('in the stocks'). In this passage the number 10 has been customarily emended to 5,<sup>38</sup> and the *μὴ* athetized<sup>39</sup> to make it consistent with our document. However, as correctly observed by Carey in

33 This is the interpretation of Wayte 1882: 173.

34 Cf. for further reasons to reject Pollux's view Moneti 2001: 102.

35 Reiske 1822: 344, endorsed by Lipsius 1905–15: 441 n. 79; Harrison 1968: 166 and recently by Moneti 2001: 102 and Pelloso 2008: 109 n. 221.

36 In legal prose the adjective is found only once (Lys. 7.39) with the meaning 'unpleasant' or 'blame-worthy', and therefore its use in this passage has nothing to do with the meaning used in our document. See Todd 2007: 539.

37 Bernard has in fact emended *αὐτὸ λάβῃ* to *ἀπολάβῃ*, but this is methodologically unacceptable: emendations to fix the text are acceptable only when a document can be shown to be authentic on independent grounds. If we understand the document as a very archaic law, then one may argue that, although *λαμβάνω* is never found in Classical sources with the meaning 'to recover', this may have been possible at an earlier date. This possibility cannot be completely ruled out, but there is no evidence whatsoever for such a usage in archaic times. We would be explaining *ignotum per ignotius*.

38 First by Taylor 1739: 177.

39 First by Auger 1783: 212.

his recent edition of the speech,<sup>40</sup> *eandem legem esse non necesse*. Carey still athetizes μη, but Todd has rightly pointed out that the provision makes perfect sense with it: ‘the point would presumably be to make the *podokkake* the minimum penalty unless the court imposed anything further’.<sup>41</sup> Moreover, in Lys. 10.17, a couple of lines later a law on theft is introduced with the words λέγε ἕτερον νόμον (‘read another law’). This suggests that the sentence just quoted does not come from a law on theft.<sup>42</sup>

Thus there is no reason for identifying the two texts. The text in Lys. 10.16 does not seem to come from a law on theft,<sup>43</sup> and the provisions of the two texts are different: one provides that thieves can receive the additional penalty of confinement in the stocks for five days, whereas the other provides that for some unknown category of criminals the minimum punishment is ten days in the stocks. The mention of Solon as the author of the law on theft at Dem. 24.103 and the provision summarized at § 114 according to which imprisonment (or confinement) can be imposed on a thief as an additional penalty, so that everybody sees that he has been imprisoned (or confined; δεσμὸν τῷ κλέπτῃ, πένθ’ ἡμέρας καὶ νύκτας ἴσας, ὅπως ὀρῶεν ἅπαντες αὐτὸν δεδεμένον) can have prompted a forger to believe that Demosthenes is here in fact commenting on the law quoted at Lys. 10.16, which provides for confinement in the stocks. One should also note that at Dem. 24.146 the orator quotes and comments on a provision stating that if one is subject to *endeixis* and *apagoge* the Eleven shall confine him in the stocks (τὸν δ’ ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἑνδεκα ἐν τῷ ξύλῳ). The mention of the Eleven and of the procedure of *apagoge*, as in the summary of the law on theft at § 113–114, convinced the forger that Demosthenes is referring to the same law, and the expression ἐν τῷ ξύλῳ, the same used by Lysias to translate ἐν τῇ ποδοκάκκῃ, must have reinforced his idea that the law quoted here was the one discussed at Lys. 10.16. So there is no reason to believe that whoever composed (or inserted) this document had access to an independent source. The imperfect similarity of the document with Lysias’ discussion does not prove the authenticity of the document. Lys. 10.16 is more likely to be the source the forger consulted when composing the document. In fact, since Lysias makes it clear that the expression was not understood in the fourth century, we would expect that, if it was actually found in the law, Demosthenes would have explained it. The fact that Demosthenes fails to do so is circumstantial evidence against the authenticity of the document.<sup>44</sup>

40 Carey 2007: 93. See already Hillgruber 1988: 26, 66–8.

41 Todd 2007: 680.

42 Hillgruber 1988: 66. Todd 2007: 680 rejects this argument on the assumption that Athenian laws were organized by procedure and magistrate, and not by substance, and therefore these might be two different laws on theft, but now see Harris 2009/2010: 11–6, who shows conclusively that Athenian laws were organized by substantive categories.

43 In Pergamum slaves who used springwater in forbidden ways without informing their owner were given ten days in the stocks (δεδέσθω ἐν τῷ ξύλῳ ἡμέρας δέκα: *OGI* 483.177 f. = *SEG* 13.521.190 f.).

44 Hillgruber 1988: 66–9 considers this law a forgery and notes that Demosthenes at § 114 seems to refer to imprisonment, and not to confinement in the stocks. Todd 2007: 679–80 counters that the

The last sentence of the first law of the document does not make any sense. It provides that ‘whoever wants shall impose this additional penalty when the penalty is discussed’ (προστιμᾶσθαι δὲ τὸν βουλόμενον, ὅταν περὶ τοῦ τιμήματος ᾗ). The previous sentence stated that the Heliiaia must impose the additional penalty. The only way to make sense of this sentence is to interpret προστιμᾶσθαι as ‘propose the additional penalty’.<sup>45</sup> This is not in itself impossible,<sup>46</sup> but using the same verb twice in quick succession with two different meanings is ‘a very confused mode of expression’.<sup>47</sup> But even if we accept this interpretation, the provision is still unacceptable. In Attic law courts, when the penalty was not fixed by law, it was the accuser and the defendant who proposed the penalties at the *timesis*, not ὁ βουλόμενος. In fact, there is no evidence whatsoever that anyone except the accuser and the defendant could propose the penalty.<sup>48</sup> More important, this is a *dike klopēs*, not a *graphe*, and therefore it is not ὁ βουλόμενος that brings the charge, but the victim.<sup>49</sup>

The first section of this document therefore does not contain any piece of information that could not be easily drawn from some passage in the orators. It presents on the other hand linguistic forms which are unparalleled in Athenian inscriptions. Finally its provisions are inconsistent with other sources about Athenian law. It cannot therefore be an authentic Athenian statute.

### The provisions about parent abusers and draft dodgers

The rest of the law read out by the secretary at § 105, or better, the other law(s) to be read out, should be concerned with parent abusers and draft dodgers. As we have seen, at § 103, just before the laws are read out, and therefore where the speaker is more like

final clause ὅπως ὀρῶεν ἅπαντες αὐτὸν δεδεμένον points to stocks in an outside location, where everyone can see the prisoner, rather than to prison. Thus also Ruschenbusch 1968: 13 and MacDowell 1978: 257. I doubt this guess can be right. At § 115 Demosthenes makes this statement clearer by saying that a thief, having been imprisoned (or confined), would live the rest of his life in shame (δεθέντα δὲ πρὸς τούτῳ τῷ τιμῇματι ἐν αἰσχύνῃ ζῆν ἥδη τὸν ἄλλον βίον). The element of shame and deep humiliation was present in the penalty of imprisonment as well, and is attested by many sources (Antiph. 5.18; Dem. 24.87, 125; cf. Dem. Ep. 2.17). Plut. *Phoc.* 36.1–2 shows that often the procession to the prisons after the arrest amounted to a proper spectacle, and the prisoner was sometimes submitted to abuse (cf. Hunter 1997: 318–9 for an insightful analysis of the social effects of imprisonment). Thus, there is hardly any need for a reference to confinement in the stocks to explain this passage. It is much more likely that Demosthenes is simply referring to prison, as he does throughout the speech. The forger misunderstood these passages.

45 Cf. Wayte 1882: 172, who however concludes that the expression is unacceptable.

46 This use is not attested for the compound προστιμᾶω, but is found with τιμᾶω (e.g. Pl. *Ap.* 36b; *Grg.* 486b; Dem. 25.74).

47 Wayte 1882: 172.

48 Cf. Harrison 1968: 80–2; MacDowell 1978: 254–8.

49 Cf. e.g. MacDowell 1978: 57–61.



ly to be trustworthy, Demosthenes mentions only three categories: thieves, convicted parent abusers (τις ἀλοὺς τῆς κακώσεως τῶν γονέων) and convicted draft dodgers (ἀστρατείας τις ὄφλη). We have already dealt with the crime of theft. As for the other two categories, according to Demosthenes, if a convicted parent abuser enters the *agora*, or if a convicted draft dodger behaves as though he were still in possession of full citizenship rights, Solon prescribed that he must be imprisoned. Comparison with passages from Andocides' *On the Mysteries* and Ps.-Aristotle's *Constitution of the Athenians* will provide us with better understanding of Demosthenes' argument.

Andocides (1.74) lists different categories of *atimoi* and mentions among others those who leave their place in battle (ὁπόσοι λίποιεν τὴν τάξιν), those that do not report for duty (ἢ ἀστρατείας), the cowards (ἢ δειλίας), those who desert from the fleet (ἢ ἀναυμαχίου) and those that throw away their shield (ἢ τὴν ἀσπίδα ἀποβάλοιεν), together with parent abusers (ἢ τοὺς γονέας κακῶς ποιοῖεν) as *atimoi* deprived of their personal citizenship rights, but retaining their property (οὗτοι πάντες ἄτιμοι ἦσαν τὰ σώματα, τὰ δὲ χρήματα εἶχον). It is clear therefore that the punishment for these crimes was loss of political rights. Lys. 14.5 also informs us that λιποτάξιον and δειλία were listed together with failure to report for duty (ὁπόσοι ἂν μὴ παρῶσιν ἐν τῇ πεζῇ στρατιᾷ; Lys. 14.7 ἀστρατείας) in the same law. Aeschin. 3.175–6 lists the same three categories as part of the same law and adds that people convicted of these offences could not enter the *agora*, the temples or wear a crown.<sup>50</sup> These are some of the consequences of *atimia*, so the passage confirms Andocides' statement that these categories were *atimoi*.<sup>51</sup> Aeschin. 1.28 also states that *atimia* is the punishment for parent abusers.

Here Demosthenes lists specific categories of *atimoi* to make his account more vivid, but in fact he refers to imprisonment as the punishment for *atimoi* who violate the conditions of their *atimia*. This punishment is described in detail in *Ath. Pol.* 63.3: if someone serves as a judge while being a state debtor or an *atimos*, he is subject to *endeixis* and tried. If convicted, the judges decide what penalty he must pay, and if the penalty is a fine, he must be imprisoned until the fine is paid.

Demosthenes claims that *atimoi* who violate the conditions of *atimia* must be imprisoned and does not mention that this occurs as the result of a failure to pay a fine. However this only shows that he is providing a brief and simplified account of the procedure described at *Ath. Pol.* 63.3,<sup>52</sup> not that he is referring to imprisonment at

50 In fact the law probably dealt with *deilia*, and ἀστρατεία and λιποτάξιον, together with other offences like deserting from the fleet and throwing away one's shield (Andoc. 1.74), were subcategories of this general law. See Harris 2004: 256–7 for a discussion of this law. For the difference between *astrateia* and *lipotaxion* see Hamel 1998.

51 Cf. MacDowell 1963: 111–3.

52 Cf. Rhodes 1981: 703.



another stage of procedure,<sup>53</sup> or twisting the letter of the law.<sup>54</sup> Demosthenes' point is that imprisonment is an additional penalty for such serious categories of criminals, and Timocrates with his law allows them to present sureties and thus avoid prison. His argument works because imprisonment in this case is a penalty added on top of a fine, otherwise it would not make any sense. Demosthenes' account is, as it must be for his argument's sake, consistent with the other sources about penalties for *atimoi* violating the conditions of their *atimia*.

Other passages of the speech do not contradict this reconstruction; indeed they often confirm it. At § 102 Demosthenes states that Timocrates' law helps malefactors (τοῖς κακούργοις), parricides (τοῖς πατραλοίαις) and draft dodgers (τοῖς ἀστρατεύτοις). Demosthenes wants to convey the impression that Timocrates' law has a wide range of applications, and that it helps very serious criminals. Therefore, thieves become generic *kakourgoi* and parent abusers become parricides. It must be noted however that in our sources thieves are the category of wrongdoers most often identified as *kakourgoi*, and the two terms are often used as synonyms.<sup>55</sup> So Demosthenes is here probably stretching the letter of the law, but his list is still consistent with § 103.<sup>56</sup> Similar lists recur often in

- 53 Scafuro 2005: 59 states that 'the reference to imprisonment in c. 103 is so elliptical, and follows so briskly upon the offense, that it is difficult to view the imprisonment as the result of an inability to pay a fine imposed by a court after a trial that is not mentioned, rather than as immediate and custodial imprisonment before the trial takes place.' Scafuro therefore claims, first, that Demosthenes here refers to 'custodial imprisonment before the trial' rather than to imprisonment on failure to pay a fine and, second, she concludes that 'Demosthenes' aim once again appears to be a sensational depiction of the consequences of Timocrates' law'. It is certainly possible that Demosthenes here is deliberately 'elliptical' to give the impression that Timocrates' law has a very wide application. However, custodial imprisonment (or rather preventive detention) is never mentioned, and if it were, it would be completely out of place, since Timocrates' law deals with imprisonment for state debtors, not with preventive detention. It is difficult to argue, without a specific mention of preventive detention, that Demosthenes would here be alluding to a kind of imprisonment that does not fit his argument and ignoring the kind of imprisonment that perfectly does.
- 54 Mirhady 2005: 71 rightly notes that Demosthenes summarizes this law as if the punishment for *atimoi* trespassing was simply imprisonment, and 'does not dwell on the fact that imprisonment could be contingent on failure to pay a fine'. However, this is in my opinion understood, rather than ignored; after all, Timocrates' law was about state debtors imprisoned on failure to pay their debt. Again why should Demosthenes twist the meaning of a law that perfectly supports his argument as it stands?
- 55 Cf. Hansen 1976: 47 with Antiph. 5.9; Dem. 23.26; Xen. *Hell.* 1.7.22. The correct procedure against *kakourgoi* was *apagoge* and three categories were named in the law as *kakourgoi*: thieves (*kleptas*), enslavers (*andrapodistas*) and robbers (*lopodutas*). Cf. above p. 32 and Harris 2006: 386–88 and 291–93.
- 56 Scafuro 2005: 58 claims that at § 102 'the misrepresentations are obvious', since *patroloiai* and *astrateuoi* are punished with *atimia*, not with imprisonment. Demosthenes is here introducing the topic of the new law without entering into detail about the provisions. In the next paragraph he will be more precise and explain that imprisonment is the penalty for convicted *patroloiai* and *astrateuoi* trespassing. I cannot see here any misrepresentation. Timocrates' law, allowing convicted *patroloiai* and *astrateuoi* who trespass to avoid imprisonment, in fact helps these categories (καὶ τοῖς πατραλοίαις καὶ τοῖς ἀστρατεύτοις βοηθοῦντα τέθηκε τὸν νόμον).

the speech. At § 107, still in the vicinity of the quotation of the law, Demosthenes claims that Timocrates should be ashamed, since he subverts the laws that protect old age and favours thieves, wrongdoers (τοὺς κακούργους) and draft dodgers (τοὺς ἀστρατεύτους) more than his fatherland. Again, there is no need here to read τοὺς κακούργους as a further category. It is a broader term that includes the previous term: thieves. At § 119, in the summary of the previous section of the speech, Demosthenes again mentions the three categories, and gives two terms for each: the thieves become also temple-robbers (τοῖς κλέπταις, τοῖς ἱεροσύλοις), the parent abusers are called parricides, and therefore become murderers (τοῖς πατραλοίαις, τοῖς ἀνδροφόνους) and the draft dodgers are assimilated with those that leave their place during the battle (τοῖς ἀστρατεύτοις, τοῖς λιποῦσι τὰς τάξεις), since these were two subcategories of the general law about cowardice (*deilia*).<sup>57</sup>

With some amplification, Demosthenes still sticks to the three categories of § 103.<sup>58</sup> We should not expect further categories of temple robbers, murderers and deserters in the law.

Some of these categories are also anticipated at § 60: Demosthenes claims that traitors to the commonwealth and parent abusers are far worse than tax farmers, excluded by Timocrates from the benefits of his law. He adds those that have unclean hands (οἱ μὴ καθαρὰς τὰς χεῖρας ἔχοντες), and finishes with εἰσιόντες δ' εἰς τὴν ἀγοράν, 'and enter the *agora*', which can refer either to the last category or to all of them. This passage poses many problems: first, what does εἰσιόντες δ' εἰς τὴν ἀγοράν refer to? Since the punishment for parent abusers was *atimia* and not imprisonment, it is safer to conclude that the specification refers to all categories: imprisonment, consistently with the other passages and with external evidence, is an additional penalty for trespassers.<sup>59</sup> Second, who are οἱ μὴ καθαρὰς τὰς χεῖρας ἔχοντες? Scafuro assumes that this must refer to men accused of killing, adducing Ant. 5.11 as evidence. However, she notes that Ant. 5.82 and Andoc. 1.95 show that killers who have not been charged were described in the same way. Moreover, Dem. 23.72–3, 37.59 and 36.22 imply that someone convicted of *akousios phonos* and exiled is polluted until the family of the killed person pardons him.<sup>60</sup> Scafuro argues therefore that the allusion here is to homicide, and killers are another category to be expected in the laws quoted at § 105. Mirhady on the other hand observes that parent abusers elsewhere are called parricides, and at § 119 even become ἀνδροφόνους. The list at § 60 is connected in asyndeton, and there is no way to know what is apposition of a previously mentioned category and what is a new category. Those with unclean hands might just be an amplification of the previously mentioned parent abusers. Moreover Dem. 22.78 = Dem. 24.186 shows that prostitutes could also be considered

57 See Harris 2004: 356–7 for the arrangement of, and the subcategories covered in, the law about *deilia*.

58 This is rightly stressed by Mirhady 2005: 72–73.

59 This is also the conclusion drawn by Scafuro 2005: 57–8.

60 Scafuro 2005: 58.

unclean.<sup>61</sup> Mirhady concludes therefore that it is far from clear whether Demosthenes is here adding another category, killers, or not. He might just be amplifying the crimes of draft dodgers and parent abusers calling them ‘traitors’ and ‘murderers’. The third problem is: how relevant is this passage for the laws quoted at § 105? However we interpret the list, the categories are not the same as in the summaries of the laws (thieves are missing), and the list appears long before the laws we are concerned with are even mentioned. Demosthenes is here picking random categories of serious criminals who can take advantage of Timocrates’ law to contrast them with defaulting tax farmers, who cannot, to show that the law of Timocrates is unfair. Whatever the interpretation of the passage, it can hardly tell us anything about the laws quoted at § 105.

To sum up, this section of the document should contain two laws concerned with two separate categories: parent abusers and draft dodgers. It should state that, if convicted parent abusers or draft dodgers transgress the conditions of their *atimia*, they must be tried and, if their penalty is a fine, they must be imprisoned until the fine is paid. The document on the other hand states that if someone is arrested by *apagoge* (ἀπαχθῆ) for entering where he is not allowed, since he is a convicted parent abuser (τῶν γονέων κακώσεως ἐάλωκώς), draft dodger (ἢ ἀστρατείας) ἢ προειρημένον αὐτῷ τῶν νόμων εἶργεσθαι (that is, a murderer), ‘the Eleven shall imprison him and bring him before the Heliaia’.

The first problem with this wording is caused by the verb ἀπαχθῆ. This verb clearly refers to the procedure of *apagoge*,<sup>62</sup> and *endeixis* is not mentioned in the document.<sup>63</sup> However, in all our sources the procedure used against *atimoi* who violate the conditions of their *atimia* invariably involves *endeixis* (whether this was followed by an *apagoge* or not).<sup>64</sup> Hansen argues that the document as we have it might report just the second part of the law, and the *apagoge* might be the effect of an *endeixis* previously

61 Mirhady 2005: 73 adduces Dem. 57.55 as evidence that non-genuine citizens could also be called ‘polluted’ (ὅσοι μὴ καθαρῶς ἦσαν πολῖται). But here the adverb καθαρῶς simply means ‘purely’ and refers to the degree of citizenship. This passage needs have nothing to do with ritual purity.

62 Cf. e.g. Antiph. 5.85, Isae. 4.28, Dem. 23.80, 24.146, 209. For a full treatment of the procedure see Hansen 1976.

63 Hansen 1976: 9–24 has argued that *apagoge* could sometimes be a further step following an *endeixis*. There is no mention of *endeixis* in this document.

64 For references see Hansen 1976: 94–5 nn. 2–3. MacDowell 1990: 280 and 1985: 73–4 has argued that Dem. 21.59–61 might refer to *apagoge* against *atimoi* and that ‘D.’s words in 59–60 (especially δεῖν αὐτὸν ἐπιλαβόμενον τῇ χειρὶ) seem not to allow for *endeixis* as a possibility in this case’. However Scafuro 2005: 55 n. 11 has argued that the language used there (ἦψατο; ἐξαγαγεῖν οὐδὲ κωλύσαι; ἐπιλαβόμενον τῇ χειρὶ) is never used for *apagoge*, and does not refer to it. Even if we accept that this passage does refer to *apagoge*, its wording is too vague to assume that this is not intended (following Hansen’s reconstruction of these procedures, which MacDowell seems to endorse) as an *apagoge* following an *endeixis*. The expression δεῖν αὐτὸν ἐπιλαβόμενον τῇ χειρὶ does not exclude the possibility of a previous *endeixis*, it simply makes it clear that this should be followed in this case by an *apagoge* (if this is what ἦψατο, ἐξαγαγεῖν οὐδὲ κωλύσαι, ἐπιλαβόμενον τῇ χειρὶ allude to). No conclusions about the feasibility of direct *apagoge* against *atimoi* can be drawn from this passage.

mentioned. However, this explains *ignotum per ignotius*. Moreover, if the law began with a provision allowing *endeixis* against certain categories, then there would be no reason to repeat the categories again in the section preserved.<sup>65</sup> *Apagoge* against *atimoi* without any mention of *endeixis* is unparalleled in our sources, and its presence here speaks against the authenticity of the document.

The second problematic expression is ἡ προειρημένον αὐτῷ τῶν νόμων εἶργεσθαι. This expression has been traditionally interpreted as referring to accused killers subject to public proclamation and excluded from customary places.<sup>66</sup> The reason for this identification is the almost *verbatim* correspondence of this expression with Ant. 6.34, 35, 40. The same expression refers to killers at Pl. Leg. 871a and 873b, in Dem. 23.42 and in *Ath. Pol.* 57.2. In all these passages νόμων is replaced by νομίμων, and has been therefore emended accordingly in our document by Salmasius. The only other case in which the expression occurs, again with reference to accused killers, with νόμων is Lyc. 1.65.<sup>67</sup>

Whether the expression is acceptable with νόμων or not, its presence here causes many problems. First, as we have seen, killers are never mentioned in the summaries and allusions to the law throughout the speech, and should not be here. Second, *apagoge* against trespassing killers is described at Dem. 23.80 and the two accounts are inconsistent: Dem. 23.80 states that if an *androphonos* is caught in the sanctuaries or in the *agora* he can be arrested and imprisoned. Once arrested, he shall not suffer any harm, but if he is convicted at the trial the penalty is death. If the accuser fails to get a fifth of the votes, he is to pay a penalty of 1000 drachmas.<sup>68</sup> The procedure described

65 I rework here an argument formulated for different purposes in Gagarin 1979: 317 n. 49. See also Scafuro 2005: 56, who argues that a participle (‘If someone [having first been denounced] is arrested...’) would solve this problem but observes that if this is the case, why would the transcriber of the law have elided it? In any case, emending the text is acceptable only if the law can be deemed authentic on different grounds; otherwise emending a document into authenticity is begging the question.

66 Cf. MacDowell 1963: 26–7; Hansen 1976: 99–100; Gagarin 1979: 315–6; Hansen 1981: 17–21; Scafuro 2005; Phillips 2008: 129–30 n. 60.

67 Stephanus corrected it to νομίμων.

68 It is unclear whether any other source about *apagoge* connected with homicides does in fact relate to cases of *apagoge phonou* (which had to do with trespassing homicides: see Volonaki 2000: 162–4, *pace* Carawan 1998: 362–4). Ant. 5 certainly did not: it was a case of *apagoge kakourgon* (see recently Volonaki 2000: 153–60), and is therefore irrelevant here. As for Lys. 13, the different positions are exemplified by Hansen 1976: 101–3, 107, who believes that this is an *apagoge kakourgon* (see also Phillips 2008: 189, especially n. 10), and MacDowell 1963: 130–7, who believes that this is an *apagoge phonou*, therefore against a trespassing homicide (see also e. g. Gagarin 1979: 319–21; Volonaki 2000: 160–5). We find the same disagreement for the trial of Menestratus (Lys. 13.55–7), with Hansen 1976: 104 and 1981: 21–2 arguing for *apagoge kakourgon* and MacDowell 1963: 137–8 (see also Volonaki 2000: 165–7) for *apagoge phonou*. Even if we believe that Lys. 13 was delivered in an *apagoge phonou* case, and the trial of Menestratus was also an *apagoge phonou* case, nothing in these sources contradicts the account of Dem. 23.80, or supports any of the provisions of our document against it.

here is an *agon atimetos* whereas our document prescribes an *agon timetos*. Moreover, the procedure laid down here is alternative to a *dike phonou* whereas our document's procedure is only an interruption of the *dike phonou* started with the *prorrhesis*. Furthermore, the document, purportedly the origin of the account at Dem. 23.80, does not mention any 1000 drachmas penalty.<sup>69</sup> Hansen has tried to eliminate these problems by arguing that the two procedures are different. The *androphonos* of Dem. 23.80 would be only the suspected homicide, and the procedure there described is available only before the *prorrhesis*. After the *prorrhesis* the correct procedure would be the one laid down in the document.<sup>70</sup> There is no evidence, nor any indication in the text, that restricts the application of the law summarized at Dem. 23.80 to suspected homicides. But even if we accept Hansen's guesswork, the relationship between this law and the one in our document is not straightforward; Hansen himself points out that if an involuntary killer trespasses before a proclamation is made, he must be punished with death, but if he trespasses after the proclamation, he could be punished with a fine and eventually sentenced in the Palladion to exile.<sup>71</sup> It is difficult to account for such a contradiction.

Mirhady has tried to defend the document by arguing that its wording need not necessarily refer to homicides.<sup>72</sup> It might refer to *atimoi* in general and thus *prorrhesis* might be used also for the *atimoi* by 'requirement' (*prostaxis*) listed at Andoc. 1.76.<sup>73</sup> This is explaining *ignotum per ignotius*. Against this hypothesis one can add that *prorrhesis* is never mentioned in our sources for any crime other than homicide. Likewise, εἴργεσθαι τῶν νόμων (or νομίμων) is never used for generic *atimoi* or outside the context of homicide charges.<sup>74</sup> The expression ἡ προειρημένον αὐτῷ τῶν νόμων εἴργεσθαι must be interpreted as referring to homicides and is therefore out of place here. Moreover, the provisions for trespassing homicides found in this document conflict with the other sources about *apagoge* of homicides.

The next clause in the document, εἰσιὼν ὅποι μὴ χρή, is inconsistent with the epigraphical sources. For the expression 'it is not allowed', Attic inscriptions (and inscriptions in general) always use the expression μὴ ἐξεῖναι. The expression μὴ χρή is never attested.<sup>75</sup>

The remaining part of the document appears to reproduce almost *verbatim* the final section of the document at § 63 of the speech *Against Timocrates*, and therefore its wording does not present any problem, since that document is likely to be authen-

69 Gagarin 1979: 313–22 argues that the differences between the document and Dem. 23.80 are superficial and the two procedures might be the same, but see Hansen 1981: 17–21 and Scafuro 2005: 52–6.

70 Hansen 1976: 99–100; 1981: 17–21.

71 Hansen 1976: 101 and Scafuro 2005: 56.

72 Mirhady 2005: 74.

73 Cf. MacDowell 1962: 106–13; Hansen 1976: 82–6; Canevaro – Harris 2012.

74 In Ar. *Vesp.* 467 the chorus accuses Bdelycleon: ,τῶν νόμων ἡμᾶς ἀπείργεις ὧν ἔθηκεν ἡ πόλις'. The expression here means that Bdelycleon denies the chorus their legal right to sit as judges (Sommerstein 1983: 185), is not an allusion to *atimia*.

75 Cf. e. g. *IG* II<sup>2</sup> 28 l. 11, 43 l. 36, 97 l. 12, 141 l. 33.

tic.<sup>76</sup> However, some of the provisions are appropriate for that document, but seem inappropriate here. In particular the mention of preventive detention is absent from the orator's account of the law. This is not conclusive evidence that it could not have been part of the law, but it is suspect. The document also states that κατηγορεῖτω δὲ ὁ βουλόμενος οἷς ἔξεστιν. This provision was necessary in the document at § 63, since the topic there is *eisangelia* and such a procedure could be activated in many different ways, sometimes following an *apochairotomia* of a magistrate in the Assembly<sup>77</sup> or as a result of the supervisory work of the Council.<sup>78</sup> In such cases there was no obvious prosecutor for the trial before the judges. In the context of this document however such a provision, placed where we find it, seems out of place. The sources clearly show that full responsibility of the prosecution in cases of *apagoge* lay with whoever carried out the arrest in the first place.<sup>79</sup> The document, by mentioning ὁ βουλόμενος not at the beginning, but after the provision about preventive detention and before those about conviction and punishment, seems to imply that whoever wished so could pick up the role of accuser after the offender had been imprisoned. This was certainly not possible, and whoever carried out the arrest in the first place had to act as the prosecutor in court. This provision is likely to have been copied by a forger, together with the entire last section of the document, from the document at § 63. The forger did not realize that some of the provisions he copied were out of place here.

To sum up, the second part of the document, as the section about theft, is inconsistent with the orator's account and with other sources about the relevant procedure. Moreover some of the language and expressions are inconsistent with the wording of contemporary Athenian laws and decrees in inscriptions.

### Conclusions

This analysis has shown that the document in its entirety is very inconsistent with the summaries and paraphrases of its contents provided by Demosthenes in the speech *Against Timocrates*, as well as with external evidence from other speeches and from Ps.-Aristotle's *Constitution of the Athenians*, and that its language is incompatible with that of contemporary Athenian inscriptions. Furthermore, it is possible to trace the origin of much of the information provided by the document in the very speech in which it was inserted, as well as in other speeches of the orators. There is no need to postulate that

76 This document was probably included already in the stichometric edition of the speech, and none of its features contradicts other evidence about *eisangelia*. Moreover, its wording is strikingly consistent with contemporary Athenian inscriptions. I have argued for its authenticity in Canevaro 2011: 213–22.

77 Hansen 1975: 41–4 discusses many such cases and concludes that ‘an *apochairotomia* of a magistrate was normally the first step towards an *eisangelia*.’ The same opinion is expressed by Harrison 1971: 59 and Rhodes 1979: 110 n. 69.

78 Cf. Hansen 1975: 31–3.

79 Cf. for full discussion of the sources Hansen 1976: 13–17.



the editor that inserted the document used an external source lost to us, which preserved authentic details of Athenian law and procedure. In fact, the number and nature of the problems found with this document militate against any 'conservative' hypothesis. The most economical way to account for all of them is to consider it a later forgery, which contains no reliable information about Athenian laws and legal procedures.

The main conclusions of this essay are in part negative, but they have a positive aspect: they remove many obstacles to our understanding of the Athenian laws about theft, *atimoi*, parent abusers and draft dodgers. They also make previous attempts to reconcile the information about these procedures found in the document with other evidence unnecessary. This is not the place to draw out the implications of my findings for our understanding of these procedures. Each one of them would deserve a separate article. Yet it is appropriate to conclude with a list of the main results of this study.

1. In all likelihood at § 105 of the *Against Timocrates* the speaker asks the secretary of the court to read out three different texts, one about thieves, one about convicted parent abusers and one about convicted draft dodgers. In any case, whatever the number of different laws, these were the only categories with which these laws were concerned.

2. In cases of *dike klopēs*, no distinction was drawn between cases in which the stolen goods were recovered and cases in which they were not. In all cases, the penalty for theft was giving back twice the amount stolen (not twice the amount in addition to the stolen goods).

3. As a consequence, thieves never had to pay a penalty of ten times the value of the stolen goods. This penalty, as § 112 and *Ath. Pol.* 54.2 show, was imposed only on magistrates convicted for theft or embezzlement, not on thieves of private property.

4. There is no evidence that the law paraphrased by Demosthenes provided for thieves to be confined in the stocks. It is more likely, as Demosthenes states at § 112, that thieves could be given the penalty of five days and five nights in prison, in addition to paying back twice the amount they had stolen. There is therefore no reason to assume that the law discussed at *Lys.* 10.16, with the mention of the *podokakke*, is the same that Demosthenes asks here to be read out.

5. In a *dike klopēs* it was the victim that brought the charge, and it was the victim, as the accuser, that had the power to request the additional penalty of imprisonment (not ὁ βουλόμενος as stated in the document). The judges in the lawcourt had then to vote on this proposal.

6. Convicted parent abusers, as well as the various categories of cowards (who committed ἀστρατεία or λιποτάξιον or any other offence falling under the rubric of *deilia*), since they were *atimoi*, were not allowed to enter the *agora* and the temples. If they did, they were tried through *endeixis* and once convicted, if the penalty was a fine, they had to remain in prison until they paid it.

7. Since the document is unreliable, it does not provide any evidence that *apagoge* alone was in certain cases used against *atimoi*. The correct procedure against *atimoi*, as all our sources confirm, started with *endeixis*.



8. It is not clear whether this procedure involved or not preventive detention before the trial. Such a measure is not mentioned in Demosthenes' paraphrases, and the document cannot be used as evidence of its use against trespassing *atimoi*.

9. None of the laws that the speaker asks the secretary to read out at § 105 of this speech had anything to do with homicide. The document is of no help for reconstructing the so-called *apagoge phonou*, and therefore nothing in this speech contradicts the account provided at Dem. 23.80. That account clearly shows that if a homicide is caught in the sanctuaries or in the *agora* he can be arrested and imprisoned. He shall not suffer any harm before the trial, but if he ends up being convicted, the penalty is death. If the accuser does not get a fifth of the votes, he must pay a penalty of 1000 drachmas.<sup>80</sup>

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80 This is the approach of Volonaki 2000. She never mentions this document but gives no reasons for ignoring it.

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